EX PARTE OR LATE FILED

DOCKET FILE COPY ORIGINAL

LAW OFFICES
BESOZZI, GAVIN, CRAVEN & SCHMITZ
1901 L STREET, N.W., SUITE 200
WASHINGTON, D.C. 20036

TELEPHONE: (202) 293-7405
FACSIMILE: (202) 457-0443

STEPHEN DIAZ GAVIN

ORIGINAL

March 28, 1996

RECEIVED

MAR 28 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

Re: ***Ex Parte Presentation***
ET Docket 95-183 and PP Docket No. ~~95-183~~ 93-253

Dear Mr. Caton:

Pursuant to Sections 1.1207(1) and (2) of the Commission's Rules, I am reporting on an an *ex parte* presentation made on behalf of Commco, L.L.C. ("Commco") in connection with ET Docket No. 95-183 and PP Docket No. 95-183. Yesterday, March 27, 1996, I and two other representatives of Commco, Andrea S. Miano and Thomas M. Ryan, spoke by telephone with Blair Levin, Chief of Staff to Chairman Hundt. We inquired about the status of Commission action on Commco's pending Emergency Request for Stay and Petition for Reconsideration, both filed January 16, 1996, directed at the Commission's *Notice of Proposed Rulemaking and Order*, FCC 95-500, released December 15, 1995, in ET Docket 95-183 and PP Docket No. 95-183 (the "*Order*").

Commco's representatives reiterated the principal legal arguments regarding retroactive reach of the *Order* and discussed the financial impact on Commco and similarly-situated applicants of further delay in acting favorably on Commco's petitions.

In addition, Commco has sent Mr. Levin copies of the Emergency Request for Stay and Petition for Reconsideration, together with the attached cover letter from Mr. Ryan. Those two filings are presently available in the docket files for ET Docket No. 95-183 and PP Docket No. 95-183. I have attached copies of the other documents sent to Mr. Levin, a summary point paper regarding the merits of Commco's position regarding the freeze imposed by the *Order* and a letter from Senators Pressler and Daschle addressing the freeze.

If you have any questions about this matter, please call me at at (202) 293-7405. Effective April 1, 1996, I can be reached at Patton Boggs, L.L.P. at (202) 457-6340.

Very truly yours,

Stephen Diaz Gavin

Attachments
cc: Blair Levin, Esq. (Hand Delivered)
Thomas M. Ryan, Esq.
Andrea S. Miano, Esq.
0750/exparte4.ltr

No. of Copies rec'd 0+1
List ABCDE

OLDAKER, RYAN, PHILLIPS & UTRECHT
ATTORNEYS AT LAW
818 CONNECTICUT AVENUE, N.W.
SUITE 1100
WASHINGTON, D.C. 20006

(202) 728-1010
FACSIMILE (202) 728-4044

March 27, 1996

EX PARTE OR LATE FILED

RECEIVED

MAR 28 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. Blair Levin
Chief of Staff
Office of the Chairman
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Blair:

Thank you for taking the time to discuss the urgent concerns of our client, Commco L.L.C., with Stephen Gavin, Andrea Miano and me.

As we discussed, our client is uniquely harmed by the Commission's retroactive freeze, which we understand is unprecedented, on the processing of pending applications in the 39 GHz band. The retroactive freeze affects more than one hundred Commco applications, many of which have been pending for almost two years and all of which have been amended as a matter of right pursuant to Section 21.23 of the Commission's Rules to resolve mutual exclusivity with other applicants.

As you know, Section 309 (j)(6)(E) of the Communications Act explicitly contemplates precisely the solution Commco has employed, at considerable expense, to resolve mutual exclusivity. Auction of this spectrum, therefore, would be totally inconsistent with Congressional intent. Commco is not a speculator; indeed, our client in good faith has relied on the processing rules to plan its business and expedite service to the public.

We hope the Commission will view our plea favorably and grant Commco relief. We would be pleased to provide any additional information you might need and welcome your suggestions as to any steps we might take to expedite consideration of our Emergency Request for Stay and Petition for Reconsideration. Those filings and the other materials we discussed are enclosed.

Thank you again for your assistance.

Sincerely,

Tom

Thomas M. Ryan

Enclosures

cc: Michelle Farquar (w/ enclosures)
Stephen Diaz Gavin, Esq. (w/o enclosures)
Andrea Miano, Esq. (w/o enclosures)

United States Senate

WASHINGTON, D.C. 20510

February 9, 1996

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Chairman Hundt:

We continue to support your efforts and those of the entire Federal Communications Commission ("Commission" or "FCC") to carry out the intent of Congress that the Commission grant mutually exclusive applications for authorizations in certain radio services on the basis of competitive bidding, as authorized by the Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act" or "'93 Act").

In granting authority to the FCC to award such authorizations by auction, Congress expressly limited that authority to situations involving mutually exclusive applications. Moreover, Section 117 of the 1993 Budget Act, now codified at 47 U.S.C., section 309(j)(6)(E), directed the Commission to make every effort to avoid mutually exclusive application situations by use, among other things, of engineering solutions such as frequency coordination and amendments to eliminate mutually exclusive situations. The opportunity to generate revenues was not to be used as justification for ignoring this direction.

While some segments of the industry have expressed concern about Commission action regarding allocation of specific portions of the electromagnetic spectrum, our concern is with the larger issue of Commission implementation of Congressionally-imposed responsibilities under the '93 Act. We are particularly interested in the Commission's treatment of it's auction authority under the *Notice of Proposed Rulemaking and Order*, FCC 95-500, (the *"Order"*) covering the proposed revision of rules governing processing of 39 GHz applications.

We wholly support spectrum auctions, where reasonable, appropriate and truly representative of Congressional intent. By virtue of either completing the application process or amending already submitted applications to eliminate mutual exclusivity concerns, applicants have in essence established a fairly reasonable expectation that they would not be subjected to the competitive bidding process. In considering the public interest

to generate revenues under the '93 Act, Congress determined that the promotion of more competitive services for the public and more efficient use of spectrum were of paramount importance when compared to allocation by competitive bidding.

It therefore seems anomalous to the clearly expressed intent of Congress within the Act that applicants who have completed the application process would subsequently be exposed to having to compete for that spectrum in auctions. Clarification of the Commission's reasoning and interpretation of it's auction authority under the 1993 Budget Act would be appreciated.

Thank you for your prompt attention in this matter. We look forward to your reply.

Larry Pressler

Larry Pressler

Tom Daschle

Thomas Daschle

POINT PAPER

FCC Illegal And Inequitable Freeze Of Pending 39 GHz Applications

Background: On December 15, 1995 the FCC suddenly announced the suspension of processing of hundreds of pending applications for licenses to operate microwave facilities in the 39 GHz frequency band. Many of these applications had been pending for as much as a year; all were not mutually-exclusive (i.e., not competitive). The applicants collectively had invested at least several million dollars in engineering costs and FCC filing fees. At least two such applicants are South Dakota-based companies. The Commission's ostensible purpose for imposing the suspension is the adoption of procedures for the auction of this spectrum and, preliminary to such auctions, return of the pending applications.

Issue: The FCC's decision retroactively to impose auctions on pending, non-competing applications, filed in full reliance on previously-established procedures is inconsistent with the terms of existing auction authority, inherently inequitable and legally suspect under established principles of administrative law.

- Current statutory auction authority permits the FCC to employ competitive bidding only when there are competing applicants; the pending applications are not competing. *FCC has acknowledged as recently as January 24th the statutory limitation.*

- The Congress warned the FCC not to manipulate non-competitive situations into competitive situations for the purpose of generating revenues. Yet that is exactly what the Commission is trying to do here.

- In fact, the legislative history of current auction authority *specifically* discourages the Commission from looking first and only to auctions to resolve competing situations. Here the Commission is effectively seeking to "create" competition to justify auctions.

- The "freeze" and potential return of the applications threatens the loss of millions invested in good faith reliance on the principle that only where there are competing applications can competitive bidding occur. Retroactively pulling the regulatory rug out from under these applicants now is equitably unfair and legally suspect under established principles of administrative law.

- The "freeze" applies even to minor amendments to pending applications.

- The FCC previously contemplated the same result with respect to pending applications for 800 MHz specialized mobile radio service, arguably more valuable, voice-based spectrum, and ultimately recognized the inequity of its position. Those applications were processed to grant.

- The CBO has assigned no dollar value in the Budget Reconciliation Bill to this spectrum in its projection that $15.3 billion could be raised from spectrum auctions; this spectrum was specifically *not* contemplated for auction by the Budget Reconciliation Bill.

- Most of the applicants are small or modestly-sized companies that would have severe difficulty in competing in any competitive bidding war with large telecommunications conglomerates.

- The public will be denied the benefit of competitively priced service by further delay.

Conclusion: The FCC should immediately resume the processing of pending 39 GHz applications where there are no competing applications or for which amendments were filed to eliminate the competing application situation.